Manzer Medical Sdn Bhd & Ors v Bongsor Bina Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1198–05 OF 2012
ABDUL WAHAB, BALIA YUSOF AND ABANG ISKANDAR JJCA
27 JUNE 2018

Contract — Building contract — Agreement — Payment for work done on basis of letter of acceptance of tender — Form and condition of contract of tender documents based on Persatuan Arkitek Malaysian Form of Contract — Refusal, neglect and/or failure of employer to make payment of amount stated in certificates to employee — Employer terminated employee's employment — Claim by employee for payments under interim architect certificates

Pursuant to an agreement between the respondent ('the plaintiff') and the first appellant ('the first defendant'), the plaintiff agreed to build and complete a hospital building while the first defendant agreed to pay the plaintiff for the work done on the basis of 'letter of acceptance of tender'. It was agreed that the acceptance of the letter of tender was subject to the terms and conditions of the tender documents which stipulated that the form and condition of the contract would be the Persatuan Arkitek Malaysia ('PAM') form of contract with its terms and conditions ('the contract'). One of the terms of the PAM Contract Form was that the defendant will pay to the plaintiff upon the issuance of interim certificate issued by the first defendant's architects, the third appellant ('the third defendant'). The plaintiff then commenced building and construction works. The first defendant issued an irrevocable instruction to its financier, Malaysia Building Society Bhd ('the fourth defendant') to directly pay the plaintiff all loan drawdown payments for the work. The fourth defendant affirmed that the plaintiff would accept and comply with the directions. There was also a condition that the plaintiff should place with the first defendant, inter alia, a performance bond in the form of a banker's guarantee. The plaintiff had obtained and handed over to the first defendant, an insurance implementation insurance from the Malayan British Assurance ('the MBA') ('the guarantee'). The guarantee provides that if the plaintiff commits a breach of its obligations under the contract, the buyer would indemnify the first defendant RM1,116,500 within three months after receiving a written notice from the first defendant. The fourth defendant agreed to release the loan drawdown directly to the plaintiff. Two architect certificates were issued. However, the defendant refused, neglected and/or failed to make payment of the amount stated in the certificates to the plaintiff. Instead, the first defendant terminated the plaintiff's employment on the ground that it had wholly-suspended and stopped work on the site and for removing materials from the site without the consent of the architect. The

plaintiff instituted suits of action against: (a) the first defendant in respect of the interim architect certificates; (b) the fourth defendant to claim for interim certificates; and (c) the first defendant for, inter alia, a mandatory injunction to compel the defendant to return the guarantee and to restrain the defendant from issuing any notice to MBA to allow MBA to make payment to the defendant. The suits were consolidated and heard together. The High Court judge ('the HCJ') held that the first to third defendants were jointly and severally liable to pay the plaintiff the sum of: (i) RM1,971,300; (ii) RM564,000 with interest; and (iii) general damages. The HCJ also granted the plaintiff a mandatory injunction to compel the first defendant to immediately return the guarantee. The counterclaim by the first to third defendants against the plaintiff were dismissed. Hence, the present appeal.

Held, dismissing appeal with costs of RM10,000:

(1) If the first defendant had intended to pay the full sums as certified in the first and second certificates to the plaintiff, the first defendant would have instructed the fourth defendant to release the drawdown straight to the plaintiff and not to the first defendant. The plaintiff had also adverted to the fact that despite a bridging loan in place, the first defendant did not pay its previous contractor in full. There was a 'motive' to commit fraud among the three defendants to reduce the costs of construction of the project, causing loss to the plaintiff who was not paid for the work that it had performed as certified. The court was in full agreement with the findings and the conclusion of the HCJ on the issue of conspiracy to defraud the plaintiff (see paras 27–28).

(2) The plaintiff had proven their cause of action for conspiracy to defraud the plaintiff on the balance of probabilities by all the first to third defendants. The trial judge had come to the correct conclusion from the inferences drawn from such correspondences. Without the contribution of each of these defendants, the impugned act against the plaintiff pertaining to its payment could not have come to its desired fruition. As a result of the exchanges of correspondences, the plaintiff was denied payment for work it had done at the behest of the first defendant (see para 29).

[Bahasa Malaysia summary

Berdasarkan perjanjian antara responden ('plaintif') dan perayu pertama ('defendan pertama'), plaintif bersetuju membina dan menyempurnakan bangunan hospital sementara defendan pertama bersetuju membayar plaintif untuk kerja-kerja yang dilakukan atas dasar 'surat penerimaan tender'. Disetujui bahawa penerimaan surat tender adalah tertakluk pada terma dan syarat dokumen tender yang menyatakan bahawa bentuk dan syarat kontrak adalah Kontrak Perjanjian Persatuan Arkitek Malaysia ('PAM') dengan terma-terma dan syarat-syarat yang terkandung dalamnya ('kontrak'). Salah

satu terma dalam Borang Kontrak PAM adalah bahawa defendan akan membayar kepada plaintif apabila sijil interim dikeluarkan oleh arkitek defendan pertama, perayu ketiga ('defendan ketiga'). Plaintif kemudiannya memulakan kerja pembinaan dan pembangunan. Defendan pertama mengeluarkan arahan yang tidak boleh ditarik balik kepada pembiayanya, Malaysia Building Society Bhd ('defendan keempat') untuk membayar secara langsung kepada plaintif semua bayaran pinjaman untuk kerja-kerja tersebut. Defendan keempat mengesahkan bahawa plaintif akan menerima dan mematuhi arahan. Terdapat juga syarat bahawa plaintif patut memberi defendan pertama, antara lain, bon prestasi dalam bentuk jaminan perbankan. Plaintif telah memperoleh dan menyerahkan kepada defendan pertama, insurans pelaksanaan insurans dari Malayan British Assurance ('MBA') ('jaminan'). Jaminan ini menyatakan bahawa jika plaintif melakukan pelanggaran kewajipannya di bawah kontrak, pembeli akan menanggung rugi defendan pertama RM1,116,500 dalam tempoh tiga bulan selepas menerima notis bertulis daripada defendan pertama. Defendan keempat bersetuju melepaskan pengeluaran pinjaman secara langsung kepada plaintif. Sijil arkitek dikeluarkan. Walau bagaimanapun, defendan enggan, cuai dan/atau gagal membayar jumlah yang dinyatakan dalam sijil kepada plaintif. Sebaliknya, defendan pertama menamatkan perkhidmatan plaintif dengan alasan bahawa ia telah menggantung sepenuh kerja di tapak dan menamatkan kerja-kerja di tapak dan membuang bahan-bahan dari tapak tanpa persetujuan arkitek. Plaintif memulakan tindakan guaman terhadap: (a) defendan pertama bagi sijil arkitek interim; (b) defendan keempat untuk menuntut sijil interim; dan (c) defendan pertama untuk, antara lain, injunksi mandatori untuk menggesa defendan mengembalikan jaminan dan untuk menghalang defendan mengeluarkan notis kepada MBA untuk membolehkan MBA membuat bayaran kepada defendan. Guaman-guaman ini disatukan dan didengar bersama. Hakim Mahkamah Tinggi ('HMT') berpendapat bahawa defendan pertama dan ketiga bersama dan secara berasingan bertanggungan membayar plaintif jumlah: (i) RM1,971,300; (ii) RM564,000 dengan faedah; dan (iii) ganti rugi am. Hakim Mahkamah Tinggi juga memberikan plaintif injunksi mandatori untuk menggesa defendan pertama untuk segera memulangkan jaminan. Tuntutan balas oleh defendan pertama dan ketiga terhadap plaintif ditolak. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Jika defendan pertama berniat membayar jumlah penuh seperti yang diperakui dalam sijil pertama dan kedua kepada plaintif, defendan pertama akan mengarahkan defendan keempat untuk melepaskan jumlah ini terus kepada plaintif dan bukan kepada defendan pertama. Plaintif juga telah mengemukakan fakta bahawa walaupun terdapat 'bridging loan', defendan pertama tidak membayar kontraktornya sebelum ini sepenuhnya. Terdapat 'motif' untuk melakukan penipuan

A antara ketiga-tiga defendan untuk mengurangkan kos pembinaan projek itu, menyebabkan kerugian kepada plaintif yang tidak dibayar untuk kerja yang telah dilakukan seperti yang diperakui. Mahkamah bersetuju sepenuhnya dengan penemuan dan kesimpulan HMT tentang isu konspirasi untuk menipu plaintif. (lihat perenggan 27–28).

B (2) Plaintif telah membuktikan kausa tindakan mereka untuk konspirasi menipu plaintif atas imbangan kebarangkalian oleh semua defendan pertama dan ketiga. Hakim bicara telah membuat kesimpulan yang betul berdasarkan kesimpulan yang diperoleh dari surat-menyurat. Tanpa C sumbangan setiap defendan, perbuatan yang dikenakan terhadap plaintif berhubung bayarannya tidak dapat mencapai hasil yang diinginkannya. Hasil surat-menyurat ini, plaintif dinafikan bayaran kerja yang telah dilakukannya atas perintah defendan pertama (lihat perenggan 29).]

D **Notes**

For cases on agreement, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4158–4162.

Cases referred to

E *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, CA (refd)

Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyds Rep 403, HL (refd)

Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)

F *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Appeal from: Civil Suit Nos S3–22–53 of 2003, S6–22–588 of 1999 and S5–22–193 of 2000 (High Court, Kuala Lumpur)

G *Ernest Azad (Mohd Ilias Mohd Noor with him) (Mohd Ilias & Co) for the appellant.*

KL Pang (Shelby Chin with him) (Cheah Teh & Su) for the respondent.

H **Abang Iskandar JCA (delivering judgment of the court):**

BRIEF FACTS OF THE CASE

[1] Pursuant to an agreement ('the agreement') between Bongsor Bina Sdn I Bhd ('the plaintiff') and Manzer Medical Sdn Bhd ('first defendant'), the plaintiff agreed to build and complete a six-storey specialist hospital building in Kota Bharu, Kelantan ('the construction project') while first defendant agreed to pay the plaintiff for the work done on the basis of 'letter of acceptance of tender' dated 21 January 1999.

[2] It was agreed that the acceptance of the said letter of tender was subject to the terms and conditions of the tender documents which stipulated that the form and condition of the contract will be the Persatuan Arkitek Malaysia ('PAM') form of contract with its terms and conditions therein ('the contract'). A

[3] One of the terms of the PAM contract form is that first defendant will pay to the plaintiff upon the issuance of interim certificate issued by the first defendant's architects, namely Rekajati Arkitek ('the third defendant'). B

[4] The plaintiff commenced building and construction works thereto. C

[5] The first defendant issued an irrevocable instruction to its financier, Malaysia Building Society Bhd ('the fourth defendant'/'MBSB') to directly pay the plaintiff all loan drawdown payments for the work by a letter dated 6 February 1999. MBSB had affirmed that the plaintiff would accept and comply with the directions. D

[6] In addition, there were also conditions that the plaintiff should place with first defendant, among others, a performance bond in the form of banker's guarantee. The plaintiff had obtained and handed over to the first defendant, an Insurance Implementation Insurance No 18567/IG/99 dated 29 April 1999 from the Malayan British Assurance ('MBA') ('the guarantee'). E

[7] The guarantee provides, among others, that if the plaintiff commits a breach of its obligations under the contract, the buyer will indemnify first defendant RM1,116,500 within three months after receiving a written notice from the first defendant. F

[8] By letter dated 2 March 1999, MBSB agreed to release loan drawdown directly to the plaintiff. Two architect certificates had been issued namely interim architect certificate No 1 dated 31 May 1999 in the sum of RM1,971,300 and interim architect certificate No 2 dated 13 July 1999 in the sum of RM564,000 ('the certificates'). G

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[9] Despite the issuance of the certificates, the defendant had refused, neglected, and/or failed to make payment of the amount stated in the certificates to the plaintiff. Instead, the first defendant terminated the plaintiff's employment on the ground that it had wholly suspended and then stopped work on site and for removing materials from the site without consent of the architect. I

[10] The plaintiff thus instituted a civil action against the Manzer Medical Sdn Bhd vide Civil Suit S-22–90 of 2003 ('Suit 90') to claim among others:

A (a) the sum of RM1,971,300 in respect of interim architect certificate No 1;

(b) the sum of RM564,000 in respect of interim architect certificate No 2;

(c) interest at the rate of 8% pa on the sum of RM2,535,300 from the date of judgment till the date of full realisation; and

B (d) costs of this suit.

[11] In Civil Suit S6-22–588 of 1999 ('Suit 588'), the plaintiff instituted an action against MBSB to claim among others, the sum of RM1,971,316.97 for C the interim certificate No 1 and RM564,000 for interim certificate No 2.

[12] While vide Civil Suit S5–22–193 of 2000 ('Suit 193'), the plaintiff claimed against Manzer Medical Sdn Bhd for among others, a mandatory injunction to compel the defendant to return the guarantee and to restrain the D defendant from issuing any notice to Malayan British Assurance to allow MBA to make payment to the defendant.

[13] In the statement of defence in Suit 90, the first defendant contended, E among others, that there was no formal contract between the plaintiff and the defendant, the plaintiff had taken late possession of the site and the two interim architect certificates were already cancelled by the third defendant vide its letter dated 28 July 1999.

F **[14]** The defendant, on the other hand made a counterclaim for the sum of RM5,000,000 as general damage for loss of opportunity to run a specialist hospital, the expenses to complete the abandoned project, and loss of trust from the specialist hospital suppliers.

G **[15]** MBSB in its defence in Suit 588 denied having made any agreement, or representation to the plaintiff that it will pay the loan drawdown directly to the plaintiff. By a letter dated 2 March 1999, MBSB had refused to the plaintiff's application for an irrevocable letter of undertaking that MBSB will pay the H money to the plaintiff upon the issuance of the architect certificate.

[16] While in Suit 193, Manzer Medical Sdn Bhd contended among others that the contract between plaintiff and Manzer Medical Sdn Bhd had been lawfully terminated vide letter dated 6 July 1999 and the plaintiff was not I entitled to claim for the guarantee.

[17] Vide the court order dated 19 June 2003, the High Court allowed the plaintiff's application to consolidate and hear all these three suits together and the case thereinafter was registered bearing No S3-22–53 of 2003.

DECISION OF THE LEARNED HIGH COURT JUDGE

[18] The learned High Court judge decided among others, that the first defendant, second defendant, and third defendant were jointly and severally liable to pay the plaintiff the sum of:

(a) RM1,971,300 together with interest;

(b) RM564, 000 together with interest; and

(c) general damages and costs to be assessed by registrar.

[19] The High Court judge also granted the plaintiff a mandatory injunction to compel the first defendant to immediately return the guarantee. While the counterclaim by first defendant, second defendant, and third defendant against the plaintiff, and the plaintiff's claims against the fourth defendant were also dismissed as they were not proven.

THE APPEAL

[20] Dissatisfied with the High Court decision, the first, second, and third defendants appealed to the Court of Appeal. We heard this appeal for two days after which we dismissed the appeal with costs of RM30,000, jointly and severally payable by all the three defendants. This is thus, our grounds for having so decided, with specific emphasis on the sole appeal of the third defendant, namely *Rekajati Arkitek*.

ISSUE RAISED BY THE THIRD DEFENDANT

[21] At the end of the trial, the trial judge found against all the defendants except the fourth defendant, *MBSB*. All of the three defendants were found to be jointly and severally liable to the plaintiff. The trial judge found there was a conspiracy among the three defendants to defraud the plaintiff of the payment due and owing to the plaintiff pursuant to the two certificates that were issued for the work done by the plaintiff. The trial judge also dismissed all the defendants' counterclaims.

[22] The appeal of the third defendant relates essentially to its dissatisfaction against the finding of the learned trial judge that it was liable for having conspired with the other defendants to defraud the plaintiff in respect of the payment. In fact, one of the issues to be determined by the learned trial judge was whether there was an alleged conspiracy by the first, second, third, and fourth defendants to defraud the plaintiff.

[23] What would amount to a conspiracy to defraud as a tortious claim? In our view, the trial judge had adverted to that matter in her grounds of judgment

and she had said as follows:

> Alegasi mengenai konspirasi untuk menipu diplidkan pada perenggan 28, hingga 31 penyata tuntutan terpinda plaintif. Bagi membuktikan konspirasi berkenaan Plaintif mesti establishkan, 'there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means resulting in damage to the plaintiff: lihat kes *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187; [2008] 4 CLJ 20 dan *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332; [2001] 8 CLJ 262).

[24] The standard of proof for conspiracy to defraud in a civil claim is on the balance of probabilities. In the Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, our apex court had occasion to say as follows:

> The correct principle to apply is ... where it was stipulated that at law, there are only two standard of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities for civil cases. As such, even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof was attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation.

[25] The evidence of conspiracy to defraud does not always consist of direct evidence. In fact, more often than not, if not most of the time, it is proven by inferences to be drawn from circumstantial evidence that was adduced before the court.

[26] The third defendant had denied any liability and it also denied that it was a party that was involved in a conspiracy to defraud the plaintiff as alleged.

[27] We had looked at the evidence adduced by the plaintiff including the documentary evidence. In respect of the conspiracy to defraud the plaintiff, the first defendant contended that in submitting the first and the second certificates to MBSB for payment, it was a manifestation of the first defendant's intention to pay the plaintiff. But we were with the plaintiff that such a contention was illogical, for the simple reason that if the first defendant had really intended to pay the full sums as certified in the first and the second certificates to the plaintiff, the first defendant would have instructed MBSB, the fourth defendant to release the drawdown straight to the plaintiff, and not to the first defendant as had happened in this case. The plaintiff had also adverted to the fact that it is an undisputed fact that despite a bridging loan being in place, first defendant did not pay its previous contractor, Crest Builder in full. There was a 'motive' to commit fraud among the three defendants ie to

reduce the costs of construction of the project, thereby causing loss to the plaintiff who was not paid for the work that it had performed as certified.

[28] We therefore found it opportune to refer to the findings of the trial judge on this issue based on the documentary evidence as adduced before her. In this case, the trial judge had alluded to the strains of evidence which to her mind, had constituted the tort of conspiracy to defraud the plaintiff. We reproduce the trial judge's appreciation and findings on this issue, identified as *Issues Nos 10 and 11* at pp 24–27 of her grounds of judgment.

Daripada keterangan yang dikemukakan Plaintif telah kemukakan keterangan:

- Pada sekitar 21.1.19999 Defendan Kedua telah memberi suatu jaminan kepada Plaintif yang pembayaran ada perjanjian tersebut akan dibayar terus kepada Plaintif.
- Defendan Pertama melalui Defendan Kedua melalui surat bertarikh 6.2.1999 telah mengeluarkan arahan yang tidak boleh dibatalkan, kepada Defendan Keempat bahawa kos projek akan dibayar terus kepada Plaintif.
- Melalui keterangan surat bertaikh 31.5.1999 Defendan Pertama telah mengarahkan Defendan Keempat membayar sebanyak RM1, 971, 300 kepada Defendan Pertama.
- Dari keterangan SP1, SD1, SD2 dan SD3 mengesahkan bahawa Defendan membatalkan arahan surat terdahulu yang bertarikh 6.2.1999.
- Defendan Ketiga telah mengeluarkan Sijil No 1 pada 16.6.1999 dengan tujuan untuk mendorong Plaintif untuk meneruskan kerja-kerja pembinaan.
- Defendan Pertama melalui Defendan Kedua gagal mengarahkan Defendan Keempat membayar jumlah RM1,971,300.00 yang disahkan melalui Sijil No.1 walaupun telah mengeluarkan surat yang tidak boleh dibatalkan tersebut kepada Defendan Keempat.
- pada Julai 1999 Defendan Pertama melalui Defendan Kedua mengarahkan Defendan Keempat melepaskan wang berkenaan kepada Defendan Pertama dan bukannya Plaintif.
- pada 13.7.1999 Defendan Ketiga telah mengeluarkan Sijil No 2 dengan tujuan mendorong Plaintif untuk meneruskan kerja-kerja pembinaan.
- Defendan Pertama gagal membayar kepada Plaintif sejumlah RM564,000.00 yang disahkan melalui Sijil No 2.
- Defendan Ketiga telah mengeluarkan Sijil tersebut yang bertarikh 25.7.1999 dalam masa 12 hari selepas pengeluaran Sijil No 2 dan mengesahkan nilai kerja siap yang berjumlah RM1,129,108.29 yang kurang daripada jumlah asal.

– Melalui surat Defendan Ketiga yang bertarikh 28.7.1999 yang disalinkan kepada Plaintif telah membatalkan Sijil No 1 dan 2.

Defendan-Defendan Pertama, Kedua dan Ketiga telah berkonspirasi menipu Plaintif untuk jumlah sebanyak RM1,971,300.00 dan RM564,000.00. Plaintif juga telah menanggung kos yang besar untuk menjalankan kerja-kerja pembinaan tanpa menerima apa-apa bayaran dari Defendan-Defendan, Kerja-kerja telah dilaksanakan oleh Plaintif. Terdapat konspirasi untuk menipu Plaintif oleh Defendan.

Akibat daripada konspirasi untuk menipu ini Plaintif telah mengalami kerosakan dan kerugian. Plaintif tidak menerima sebarang bayaran bayaran bagi kerja-kerja yang telah dilaksanakan. Plaintif juga berhak untuk mendapat gantirugi.

[29] With respect, we were in agreement with the learned counsel for the plaintiff that the plaintiff had proven their cause of action for conspiracy to defraud the plaintiff on the balance of probabilities by all the first, second and third defendants. The trial judge had come to the correct conclusion from the inferences drawn from such correspondences. Without the contribution of each of these defendants, the impugned act against the plaintiff pertaining to its payment could not have come to its desired fruition. As a result of these exchanges of correspondences, the plaintiff was denied payment for work it had done at the behest of the first defendant.

[30] It was averred on behalf of the third defendant that the learned trial Judge did not consider the finding by Lembaga Arkitek Malaysia ('LAM') that the third defendant was not guilty of professional misconduct. We took note that the trial judge did not exhibit expressly in her grounds of judgment that she had taken into account that piece of evidence. That evidence had arisen when the plaintiff referred the matter to the LAM about the alleged role that was played by the third defendant in this episode. The LAM subsequently reverted back to say that it had found that the third defendant was not guilty of any professional misconduct. Having said that, we did note that the trial judge did make a general remark that she had taken into account of all the evidence that was led before her. In any event, in as much as the civil court would give deep deference to findings made by tribunals of professional bodies, such as LAM, however those findings do not as a matter of law, bind the civil courts. The civil court would not know what kind of evidence had been considered by the tribunal in coming to the decision that it did in its finding that exonerated its member against whom a complaint was lodged. In the civil court litigation, all evidence that needed to be adduced would have been adduced by litigating parties in order to prove and disprove the essential ingredients of the torts or the contractual breaches which had been pleaded by the plaintiff.

[31] We noted too, that the trial judge had subjected the evidence adduced before her to the standard of proof beyond a reasonable doubt when

considering whether the plaintiff had succeeded in proving its cause of action for conspiracy to defraud the plaintiff against all the defendants, including the third defendant. In doing so, we had seen that she had relied on several case authorities of high authority, such as *Saminathan v Pappa* [1981] 1 MLJ 121.

[32] However, in light of what was decided by our apex court in the case of *Sinnaiyah & Sons* that legal position on the correct standard of proof in all civil cases including, inter alia, for torts such as conspiracy to defraud or even fraud itself, is on the balance of probabilities.

[33] So, if the trial judge was wrong in her application of what ought to be the correct standard of proof in this case, we found that she had erred in favour of all the defendants when, in fact and in law, she only needed to be satisfied by evidence on the balance of probabilities. As such, no prejudice had been occasioned to all the defendants, including the third defendant. If even on a higher standard of proof, the trial judge had found that the plaintiff had succeeded in proving its case against all the first to third defendants, if would be illogical, at best, to even contemplate that the plaintiff ought to fail if a lower standard on the balance of probabilities, were to be applied to the same evidence that were considered by the trial judge.

[34] To dispel all doubts, we also found no reason to disturb all the other findings made by the trial judge on all other issues before her.

[35] In the final analysis, we were in agreement with the findings and the ultimate conclusion reached by the trial judge on the issue of conspiracy to defraud the plaintiff. In the upshot, we could not see how we ought to invoke our appellate powers to disturb the decision of the learned trial judge. We were ever mindful of the observation attributable to Lord Pearce in the case of *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyds Rep 403, on the proper invocation of appellate powers of the Court of Appeal of England. At p 430 the learned Law Lord had this to say:

> The functions of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a miscarriage of justice. That wrong or miscarriage of justice may consist of a Judgement in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour. *But the fact that the right party* seems *to have succeeded in the court below will naturally make* a *Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases.* Such matters are questions of degree. (Emphasis added.)

[36] In this case, the right party seemed to have succeeded in the trial court

A and as such the extreme reluctance to interfere could not be lightly uplifted from our collective minds, so to speak, unless it had been shown by the defendants that the impugned decision had been one that is plainly wrong, such that no reasonable tribunal could have arrived at the impugned decision, as did the trial court. That 'plainly wrong test' is attributable, at least in the local
B context, to the decision in the apex court case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97.

[37] Applying the above test on appellate intervention to the evidence and circumstances before us pertaining to this appeal, we saw no occasion why we
C should interfere with the learned trial judge's decision and findings. Suffice to say that the learned trial judge could not be described, after due analysis by us, as one that was plainly wrong, such that our appellate intervention was necessary in order to avoid an injustice being occasioned to the defendants.

D **[38]** As such, in the upshot, we unanimously dismissed the appeal with costs of RM10,000 from each defendants (except the fourth defendant) jointly and severally. The decision of the trial judge was affirmed. Deposit towards account of costs.

E *Appeal dismissed with costs of RM10,000.*

Reported by Afiq Mohamad Noor

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